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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-691

AMERICAN TRIAL LAWYERS ASSOCIATION, NEW JERSEY BRANCH, *et al.*, PHILIP G. AUERBACH, *et al.*,

Appellants,

v.

NEW JERSEY SUPREME COURT,

Appellees.

On Appeal From the United States District Court for the District of New Jersey

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	6
STATUTE INVOLVED	6
STATEMENT	6
THE QUESTION IS SUBSTANTIAL	11
THE THREE-JUDGE COURT ISSUE AND THE SIMULTANEOUS APPEAL TO THE COURT OF APPEALS	17
CONCLUSION	21
APPENDIX:	
A—Opinion of United States District Court for the District of New Jersey	1a
B—Rule 1:21-7 of the Supreme Court of New Jersey	5a
C—Clerk's Docket Entry of Order of September 6, 1972 Denying Plaintiff's Motion to Alter or Amend Judgment	9a
D—Notice of Appeal to the United States Supreme Court	10a

Cases Cited

Alabama Public Service Commission v. Southern Railway Co., 341 U. S. 341 (1951)	13-15
American Federation of Labor v. Watson, 327 U. S. 582 (1946)	19
Barrett v. Atlantic Richfield Co., 444 F. 2d 38 (5th Cir. 1971)	13
Board of Regents of the University of Texas System v. New Left Education Project, 404 U. S. 541 (1972)	18

PAGE

Burford v. Sun Oil Co., 319 U. S. 315 (1943) 13-16

City of Meridian v. Southern Bell Tel. & Tel Co., 358 U. S. 639 (1959) 9

Coleman v. Ginsberg, 428 F. 2d 767 (2d Cir. 1970)..... 13

County of Allegheny v. Frank Mashuda Co., 360 U. S. 185 (1959) 15

Doud v. Hodge, 350 U. S. 485 (1956), 127 F. Supp. 853 (N. D. Ill. 1955) 3-5, 12

England v. Louisiana Board of Medical Examiners, 375 U. S. 411 (1964) 10-13, 17

Fornaris v. Ridge Tool Co., 401 U. S. 41 (1970) 13

Goldstein v. Cox, 396 U. S. 471 (1970) 5

Gunn v. University Committee to End the War in Viet Nam, 399 U. S. 383 (1970) 5

Harris v. Samuels, 440 F. 2d 748 (5th Cir. 1971), cert. denied, 404 U. S. 832 (1971) 13

Harrison v. N.A.A.C.P., 360 U. S. 167 (1959) 12

Hill v. City of El Paso, 437 F. 2d 352 (5th Cir. 1971) 13

Kadans v. Collins, 404 U. S. 1007 (1972) 4

Koehler v. Ogilvie, 53 F.R.D. 98 (N. D. Ill. 1971), affirmed, 405 U. S. 906 (1972) 14, 15

Lake Carriers' Assn. v. MacMullen, 406 U. S. 498 (1972), 336 F. Supp. 248 (E. D. Mich. 1971) 4, 5, 11, 12, 14

Law Students Research Council v. Wadmond, 401 U. S. 154 (1971) 15

Leishman v. Associated Electric Co., 318 U. S. 203 (1943) 3

PAGE

Local 333B, United Marine Division, International Longshoremen's Assn. v. Battle, 101 F. Supp. 650 (E. D. Va.), affirmed, 342 U. S. 880 (1951) 14

Lynch v. Household Finance Corp., 405 U. S. 538 (1972) 2

Mengelkoch v. Industrial Welfare Commission, 393 U. S. 83 (1968) 4

Mitchell v. Donovan, 398 U. S. 427 (1970) 5

Moore v. Charlotte-Mecklenburg Board of Education, 402 U. S. 47 (1971) 5

Morey v. Doud, 354 U. S. 457 (1957) 4

Phillips v. United States, 312 U. S. 246 (1941) 18, 19

Potts v. Honorable Justices of the Supreme Court of Hawaii, 332 F. Supp. 1392 (D. Hawaii 1971) 18

Railroad Commission v. Pullman Co., 312 U. S. 496 (1941) 11, 12, 14

Razos v. Drusina, 440 F. 2d 795 (5th Cir. 1971).....18, 19

Reetz v. Bozanich, 397 U. S. 82 (1970) 6, 9-11, 14-16

Rockefeller v. Catholic Medical Center of Brooklyn & Queens, Inc., 397 U. S. 829 (1970) 5

Romero v. Coldwell, 455 F. 2d 1163 (5th Cir. 1972) 13

Rosado v. Wyman, 304 F. Supp. 1354 (E. D. N. Y.), appeal dismissed, 395 U. S. 826 (1969) 4

Rosado v. Wyman, 414 F. 2d 170 (2d Cir. 1969), reversed, 397 U. S. 397 (1970) 5

Roundebush v. Hartke, 405 U. S. 15 (1972) 16

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368 (1949) 14, 19, 20

PAGE

Suffling v. Bondurant, 339 F. Supp. 257 (D. N. M. 1972) 18

Turner v. City of Memphis, 369 U. S. 350 (1962) 20

Wilson v. City of Port Lavaca, 391 U. S. 352 (1968) 4

Wisconsin v. Constantineau, 400 U. S. 433 (1971) 14

United States v. Crescent Amusement Co., 323 U. S. 173 (1944) 3

Younger v. Harris, 401 U. S. 37 (1971) 16

Zwickler v. Koota, 389 U. S. 241, 261 F. Supp. 985 (E. D. N. Y. 1966) 4, 5, 13, 14

United States Constitution Cited

Article I, Section 10 8

Article V 8

Fourteenth Amendment 2, 8

Statutes Cited

28 U.S.C.:

Sec. 1253 3

Sec. 1254(1) 20

Sec. 1331 ..... 2, 7

Sec. 1343(3) 2, 7

Sec. 2101(b) 3

Sec. 2101(e) 20

Sec. 2281 ..... 5, 6, 9, 17-19

Sec. 2283 16

Vernon's Ann. Civ. Stat. Acts 1939, 46th Leg., Ch. 25, §1, p. 201, Art. 1731A 18

PAGE

Rules Cited

Federal Rules of Civil Procedure, Rule 59(e) 3, 9

New Jersey Supreme Court Rule 1:21-7 .....2, 6-8, 10, 15, 18, 19

Texas Rules of Civil Procedure, Rules 749, 750 18

Other Authorities Cited

MOORE, 1A FEDERAL PRACTICE (1965) 15

MOORE, 9 FEDERAL PRACTICE (2d Ed. 1972) 5

94 New Jersey Law Journal 761, 771, 897 (Aug. 19, Sept. 30, 1971) 7

95 New Jersey Law Journal 341 (April 13, 1972)..... 7

WRIGHT, FEDERAL COURTS (2d Ed. 1970) 14

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MERICAN TRIAL LAWYERS ASSOCIATION, NEW JERSEY BRANCH, *et al.*, PHILIP G. AUERBACH, *et al.*,

Appellants,

v.

NEW JERSEY SUPREME COURT,

*Appellees.**

On Appeal From the United States District Court for the District of New Jersey

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United ates District Court for the District of New Jersey, en-

* These consolidated cases are styled, in full, as follows: *Ameri- n Trial Lawyers Association, New Jersey Branch, Trial Lawyers ssociation of Middlesex County, Middlesex County Bar Associa- n, Hudson County Bar Association, Monmouth County Bar As- ciation, Herbert E. Greenstone and Morris Brown,* individually, d as class representatives of the members of each of the plain- f organizations *v. New Jersey Supreme Court,* and *Philip G. uerbach, Bernard F. Conway,* and *Trial Attorneys of New Jersey,* Corporation of the State of New Jersey, *v. The Chief Justice and e Associate Justices of the New Jersey Supreme Court.*

tered on June 21, 1972, dismissing actions for preliminary and permanent injunctions against enforcement of a Rule promulgated by the New Jersey Supreme Court, and from the denial on September 6, 1972 of a timely motion to alter or amend the judgment of dismissal. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented.

Opinion Below

The opinion of the United States District Court for the District of New Jersey is not yet reported. It is attached hereto in Appendix A.

Jurisdiction

The amended complaints in these consolidated class actions challenged Rule 1:21-7(c) of the Supreme Court of New Jersey. Rule 1:21-7(c) establishes a schedule of maximum contingent fee percentages applicable to tort litigation conducted by members of the New Jersey bar, whether in state or federal courts. The amended complaints challenged the substance of the Rule and the manner of its enactment as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States on various grounds. Questions under the Contract and Supremacy Clauses were also presented, and violation of the New Jersey Constitution was alleged as well. Jurisdiction was rested on 28 U.S.C. § 1343(3), see *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), and 28 U.S.C. § 1331. Preliminary and permanent injunctions were prayed for.

Over appellant's objection, and after argument had before District Judge Barlow on jurisdictional issues, including the issue of substantiality of the questions presented, a three-judge district court was convened. Following a hearing on appellees' motion "to dismiss the complaint for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted," the three-judge court, on June 21, 1972, entered an order granting defendant's motion to dismiss. The accompanying opinion invoked the abstention doctrine, and added that the decision to grant the motion to dismiss rendered "plaintiffs' motions moot." Appellants made a timely motion under Rule 59(e), Federal Rules of Civil Procedure, to alter or amend the jugment by substituting a stay for the order of dismissal or amending the order to make clear that the dismissal was without prejudice. This motion was denied on September 6, 1972. A notice of appeal to this Court was filed in the District Court on October 2, 1972. See *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944); *Leishman* v. *Associated Electric Co.*, 318 U.S. 203 (1943).

The jurisdiction of this Court to review the decision of the court below by direct appeal is conferred by 28 U.S.C § 1253 and 28 U.S.C. § 2101(b). If the judgment of the court below, which was a judgment granting defendants motion to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted, is viewed as a dismissal with prejudice for lack of jurisdiction, then the jurisdiction of this Court to hear the direct appeal is sustained by *Doud* v. *Hodge*, 350 U.S. 485 (1956). In *Doud*, as in the instant case, the opinion of the three-judge court rested the judgment of dismissal solely on the abstention doctrine, without in any way purporting to pass on the merits. See *Doud* v. *Hodge*, 127 F. Supp.

853 (N.D. Ill. 1955).* If the judgment of the court below is viewed as a dismissal without prejudice, more nearly conforming to approved practice in abstention cases, then the juridiction of this Court to hear the direct appeal is sustained by *Lake Carriers' Assn.* v. *MacMullan*, 406 U.S. 498 (1972); and *Zwickler* v. *Koota*, 389 U.S. 241 (1967). In the *Lake Carriers' Assn.* case, the dismissal in the court below was "without prejudice to the plaintiffs to institute other appropriate judicial proceedings." *Lake Carriers' Assn.* v. *MacMullan*, 336 F. Supp. 248, 255 (E.D. Mich. 1971). In *Zwickler* v. *Koota*, the opinion of the three-judge district court, in ordering dismissal, noted that should circumstances arise "which would not justify further abstention, the parties, of course, may seek appropriate relief in the federal courts." *Zwickler* v. *Koota*, 261 F. Supp. 985, 993 (E.D.N.Y. 1966).

Cases in which no appeal was allowed because a three-judge court ordered dismissal on grounds other than abstention and dissolved itself have no bearing on the instant case. Thus in *Wilson* v. *City of Port Lavaca*, 391 U.S. 352 (1968), the three-judge court held that plaintiff's claim was not "one which must be heard by a three-judge court." The case then proceeded to adjudication before a single judge. In *Mengelkoch* v. *Industrial Welfare Commission*, 393 U.S. 83 (1968), a three-judge court dissolved itself for the same reason, and again the case went to a single judge. See also *Kadans* v. *Collins*, 404 U.S. 1007 (1972). In *Rosado* v. *Wyman*, 304 F. Supp. 1354 (E.D. N.Y.), *appeal dismissed*, 395 U.S. 826 (1969), the three-judge court dissolved itself on the ground that the chal-

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* After the remand, *Doud* v. *Hodge* returned to this Court for review of the merits, *sub. nom. Morey* v. *Doud*, 354 U.S. 457 (1957).

lenge to a statute which had since been amended was now moot, and that any challenge to the statute as amended lacked ripeness.* Nor is there any relevance for the instant case in decisions holding that no direct appeal will lie from an interlocutory order, such as denial of a motion for summary judgment, refusing to grant a permanent rather than a preliminary injunction, *Goldstein* v. *Cox*, 396 U.S. 471 (1970), or from the grant or denial of declaratory rather than injunctive relief. *Rockefeller* v. *Catholic Medical Center of Brooklyn and Queens, Inc.*, 397 U.S. 829 (1970), see 9 MOORE'S FEDERAL PRACTICE 80, n. 50 (2d ed. 1972); *Mitchell v. Donovan*, 398 U.S. 427 (1970); and see *Gunn* v. *University Committee to End the War in Viet Nam*, 399 U.S. 383 (1970); *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 48 (1971).

The cases discussed in the immediately preceding paragraph rest on considerations of their own, which are not applicable when the question, as in the instant case, is whether there can be a direct appeal to this Court from an order grounded in the abstention doctrine. Were it otherwise, one would have to take it that the cases just referred to tacitly overruled the decisions on appealability in *Doud* v. *Hodge*, *supra*, and *Zwickler* v. *Koota*, *supra*, and were themselves overruled, equally tacitly, by the decision on appealability in *Lake Carriers' Assn.* v. *MacMullan*, *supra*. A direct appeal lies to this Court, therefore, from the judgment of dismissal in the three-judge court below in the instant case.

Appellants continue to entertain doubts that this was properly a case to be heard by a three-judge court under 28 U.S.C. § 2281, and against the event that their doubts

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* For further proceedings in this case see, *Rosado* v. *Wyman*, 414 F. 2d 170 (2d Cir. 1969), *reversed*, 397 U.S. 397 (1970).

should turn out to be well-founded, have simultaneously filed notice of appeal to the Court of Appeals for the Third Circuit and docketed their appeal in that court. The problems of the applicability of Section 2281 and of the disposition of this case should the Court conclude that a three-judge court was improperly convened are discussed in a later section of this Jurisdictional Statement.

Question Presented

Whether a federal district court, having invoked the doctrine of *Reetz* v. *Bozanich*, 397 U.S. 82 (1970), and abstained pending adjudication of issues of state law in the state courts, is authorized to enter a judgment of dismissal rather than a stay, and to decline to alter or amend the judgment of dismissal so as to indicate that it is without prejudice to resumption of the litigation in the district court, if necessary, by parties who initially exercised their right to elect that federal forum for adjudication of their federal claims.

Statute Involved

No statute is involved, but Rule 1:21-7 of the Supreme Court of New Jersey, which is attached hereto as Appendix B.

Statement

On December 21, 1971, the Supreme Court of New Jersey announced adoption of Rule 1:21-7, to be effective January 31, 1972. The court had given notice of a proposed rule limiting contingent fees some six months earlier, and had invited submission of written comments by the Bar. Requests were made to present objections orally,

and the court thereupon scheduled, and on November 6, 1971 held, a session to hear objections orally on this and other proposed rules. See 94 *New Jersey Law Journal* 761, 771, 897 (Aug. 19, Sept. 30, 1971).

Rule 1:21-7 establishes a graduated schedule of maximum contingent fees beginning with an allowance of fifty per cent of the first $1,000 recovered, and dropping to twenty per cent at $50,000 and ten per cent at $100,000. The Rule is applicable to "any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee . . . ." It is retroactve.* And it applies to cases in federal courts.**

Complaints were filed in this case on January 11 and January 20, 1972, and following the filing of amended com-

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* On April 13, 1972, the Supreme Court of New Jersey authorized publication of the following clarification, in the form of a question and answer: "Do the limits set forth in R. 1:21-7(c) apply to contigent fee arrangements entered into prior to January 31, 1972 (the effective date of the rule) but not completely performed by that date? Yes. The Supreme Court, however, expresses no view as to those arrangements fully performed before that date." 95 *New Jersey Law Journal* 341 (April 13, 1972).

** On April 13, 1972 the Supreme Court of New Jersey authorized publication of the following clarification, in the form of a question and answer: "Do the limits set forth in R. 1:21-7(c) apply to cases in federal courts? Yes. The Supreme Court considers that they apply to any contingent fee arrangement in a tort matter entered into by a New Jersey attorney, without regard to the court in which an action may subsequently be filed, and to any participation by a New Jersey attorney in a contingent fee arrangement entered into outside the State of New Jersey with respect to litigation in this State. This is not intended to deny the authority of the Federal Courts to apply a different standard to implement some other federal policy." 95 *New Jersey Law Journal* 341 (April 13, 1972).

plaints, the actions were consolidated by order of the district court on March 10, 1972. Plaintiffs, appellants here, are individual members of the New Jersey Bar specializing extensively in trial work, including tort cases, and unincorporated associations and non-profit corporations whose members are members of the New Jersey Bar specializing in trial work, including tort cases, and whose objects are the advancement of the public interest, of the professional interests of their members, of the interests of litigants, and of the interests of the Bench and Bar of New Jersey at large. Individual plaintiff-appellants, also suing as class representatives, alleged that they were injured in that their liberty to practice their profession was abridged by Rule 1:21-7, and in that the Rule would cause them to forfeit more than $10,000 each in fees in the reasonably near future. Injuries to, and derivative from those to their members, were alleged by the plaintiff associations and non-profit corporations, as class representatives as well as in their own right. The jurisdiction of the district court was invoked under 28 U.S.C. § 1343(3), and 28 U.S.C. § 1331. The amended complaints did not ask for the convening of a three-judge court.

Plaintiff-appellants alleged that Rule 1:21-7, both in its substance and in the manner of its enactment, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States; that it violates the Contract Clause of Article I, Section 10 of the Constitution of the United States, particularly in its retroactive application to contingent fee contracts entered into prior to its effective date; and that it violates the Supremacy Clause of Article V of the Constitution of the United States in its application to causes of action arising under federal statutes. Preliminary and permanent injunctions were prayed for.

Defendant-appellees moved to dismiss the complaint for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted, and argument was had before District Judge Barlow on the questions whether the case called for convening a three-judge court, and whether the questions presented were substantial. Plaintiff-appellants contended that the questions presented are substantial, but that the convening of a three-judge court was not called for because 28 U.S.C. § 2281 is inapplicable. Defendant-appellees argued that the questions presented lack substance, but that if they are to be adjudicated in a federal court, that court has to consist of three judges.

On May 2, 1972, Chief Judge Seitz convened a three-judge court. After hearing argument, that court on June 21, 1972, granted defendants' motion to dismiss. The relationship between the parties, said the court, "is an extremely delicate one." It was appropriate, therefore, "before attempting any direct federal intervention at the outset, first to permit the State courts to process the dispute." At this point the court referred to *Reetz* v. *Bozanich*, 397 US. 82 (1970), and added: "As was true in *Reetz* the initial issue is whether the state constitution authorized the enactment challenged." Then the court below quoted the passage, also quoted in *Reetz*, 397 U.S. at 85, from *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 640-41 (1959), where this Court noted that in situations of some delicacy, it was proper for "unsettled questions of state law" to be decided in state tribunals "preliminary to a federal court's consideration of the underlying federal constitutional questions. . . ."

Plaintiff-appellants thereupon, on June 28, 1972, filed a timely motion under Rule 59(e), Federal Rules of Civil

Procedure, to alter or amend the judgment of dismissal by either: "A) Retaining jurisdiction, but staying proceedings in this Court pending determination of the issues of state law in the courts of New Jersey, or until efforts to obtain such a determination have been exhausted; or B) Ordering that the dismissal be without prejudice, so that the suits for determination of the federal constitutional issues may be reinstituted after exhausting state recourse with respect to state law issues." This motion was denied without opinion on September 6, 1972.

In the meantime, on July 21, 1972, plaintiff-appellants filed an appeal in lieu of prerogative writs in the New Jersey Superior Court Appellate Division seeking adjudication of the issue of state law singled out in the opinion of the three-judge court. Plaintiff-appellants' reason for instituting an action in the New Jersey courts was that, in the interest of obtaining the speediest possible resolution of this controversy, plaintiff-appellants did not intend to, and do not now, challenge application in this case of the abstention doctrine of *Reetz* v. *Bozanich, supra.* It was appellants' expectation that the motion to amend or alter the district court's judgment of dismissal would be granted.

In accordance with the procedure prescribed in *England* v. *Louisiana Board of Medical Examiners,* 375 U.S. 411 (1964), appellants in their appeal in lieu of prerogative writs, as amended,* have informed the state courts of their

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* The amended appeal, in addition to contending that no provision of the New Jersey Constitution or of any other law of New Jersey authorized the New Jersey Supreme Court to promulgate Rule 1:21-7(c), raises other claims under the New Jersey Constitution as well, and names as parties-plaintiff only the unincorporated associations and non-profit corporations who are parties in the instant case.

federal claims, and have presented the full case, while seeking adjudication only of the issues of state law, and explicitly reserving the right to return for full disposition of the case to the federal district court. In the interest, again, of achieving the speediest and most economical resolution of this controversy, appellants intend to press the action in the New Jersey courts with a view to obtaining adjudication there of the issues of state law, and in the expectation that this Court will make clear their right to return to the federal district court for ultimate disposition of the full case, including their federal claims.

Defendant-appellees have filed an answer in the Superior Court of New Jersey Appellate Division to plaintiff-appellants' appeal in lieu of prerogative writs, and have appended to their answer a counter-claim for declaratory judgment. The counterclaim urges that the Superior Court of New Jersey Appellate Division consider plaintiff-appellants' federal claims made in the federal district court, if in the court's judgment this is appropriate in light of an overall assessment of the controversy. Plaintiff-appellants are resisting this counter-claim. Having presented their federal claims, as prescribed in *England* v. *Louisiana Board of Medical Examiners, supra,* plaintiff-appellants do not propose to press them, but rather to seek adjudication only of issues of state law, and to reserve their right to return to the federal forum in which they elected to bring suit.

The Question is Substantial

The ground of decision in the court below was the doctrine of abstention as developed and refined by this Court in cases from *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496 (1941), to *Reetz* v. *Bozanich, supra,* and *Lake*

Carriers' Assn. v. *MacMullan, supra.* A dismissal with prejudice in a *Pullman-Reetz-MacMullan* abstention case is plain error. That is the square holding of *Doud* v. *Hodge, supra.* It is the holding also of *Lake Carriers' Assn.* v. *MacMullan, supra.* In that case, as noted earlier, the district court dismissed the complaint "without prejudice to plaintiffs to institute other appropriate judicial proceedings." *Lake Carriers' Assn.* v. *MacMullan, supra,* 336 F. Supp. at 255. This Court, having held that the district court properly abstained, nevertheless vacated the judgment of dismissal, although it was without prejudice, and remanded with directions to retain jurisdiction pending appropriate proceedings in the state courts. 406 U.S. at 512-13. *A fortiori* a judgment of dismissal with prejudice would have been vacated.

The reason is not far to seek. "[W]e have on several occasions explicitly recognized," this Court has said, quoting from *Harrison* v. *NAACP,* 360 U.S. 167, 177 (1959), "that abstention 'does not, of course, involve the abdication of jurisdiction, but only the postponement of its exercise.'" *England* v. *Louisiana State Board of Medical Examiners, supra,* 375 U.S. at 416, and see n. 7. The possibility of ultimate review in the Supreme Court of the United States, the Court went on, is no adequate substitute for litigation in a district court. Hence the possibility of such ultimate review "may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." *England* v. *Louisiana State Board of Medical Examiners, supra,* 375 U.S. at 417. A dismissal with prejudice following abstention does relegate the moving party to adjudication in the state courts, holding out the possibility of ultimate review in the Supreme Court as the only means of access to any federal forum. It does amount to abdication of federal

jurisdiction rather than postponement of its exercise. And for these reasons it is impermissible.

The better practice in abstention cases, this Court noted in *Zwickler* v. *Koota, supra,* 389 U.S. at 244, n. 4, is to stay proceedings and retain jurisdiction, rather than to order dismissal of any sort. This is the practice followed by this Court. See, in addition to cases cited earlier, *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41 (1970). And it is the prevalent practice in lower courts. See, *e.g., Harris* v. *Samuels,* 440 F.2d 748 (5th Cir.), *cert. denied,* 404 U.S. 832 (1971); *Coleman* v. *Ginsberg,* 428 F.2d 767 (2d Cir. 1970).

The Court went on to observe in *Zwickler* v. *Koota, supra,* 389 U.S. at 244, n. 4, that "other courts have also ordered dismissal." Some courts have done so while specifying very carefully that the dismissal is without prejudice. See *Romero* v. *Coldwell,* 455 F.2d 1163 (5th Cir. 1972); *Barrett* v. *Atlantic Richfield Co.,* 444 F.2d 38, 44 *et seq.* (5th Cir. 1971). Such dismissals without prejudice, as Circuit Judge Clark explained in *Hill* v. *City of El Paso,* 437 F.2d 352, 357 (5th Cir. 1971), hardly differ from retention of jurisdiction, because they also do not require a party to litigate his federal claims in the state courts. Rather, like a stay, they enable the moving party to follow the procedure prescribed in *England* v. *Louisiana State Board of Medical Examiners, supra,* and retain his right to return to the federal district court for litigation of his federal claims.

Dismissals which lack the notation that they are without prejudice are characteristic of another type of decision altogether, also involving use of the term "abstention," but in a very different sense. In *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943); *Alabama Public Service Commission* v. *Southern Railway Co.,* 341 U.S. 341, 946 (1951), and

a strictly limited line of like cases, the decision was, not to postpone, but to abdicate the exercise of federal jurisdiction in a federal trial court, and to substitute, against a party's wishes, the possibility of ultimate review in the Supreme Court of the United States for the right to litigate a federal claim fully in a federal forum. This is total abstention, quite another thing than *Pullman-Reetz-MacMullan* abstention, and of course the proper disposition then is outright dismissal, with prejudice, of the suit in the federal district court. *Local 333B, United Marine Division, International Longshoremen's Assn.* v. *Battle,* 101 F. Supp. 650 (E.D.Va.), *affirmed,* 342 U.S. 880 (1951), cited by this Court as illustrative of the practice of dismissing rather than staying, *Zwickler* v. *Koota, supra,* 389 U.S. at 244, n. 4, was such a case. So probably was *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368 (1949), also cited by this Court as another illustration, although Professor Wright's view is that *Stainback* "can only be regarded as a sport." See C. WRIGHT, FEDERAL COURTS 198, n. 19 (2d ed. 1970). *Burford* is cited in *Stainback. Pullman* is not. 336 U.S. at 383, n. 29. *Koehler* v. *Ogilvie,* 53 F.R.D. 98 (D.C.N.D. Ill. 1971), *affirmed,* 405 U.S. 906 (1972), another of the exceedingly rare cases in which this Court approved an outright dismissal, was also a decision resting on the authority of *Burford* v. *Sun Oil Co., supra;* and *Alabama Public Service Commission* v. *Southern Railway Co., supra.*

Rightly or wrongly, cf. *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971), the court below in the instant case applied the *Pullman-Reetz-MacMullan* abstention doctrine. That and nothing else. And that is the only ground on which abstention could possibly have been rested in this case. Before saying that it was appropriate "first to permit the state courts to process the dispute"—the language

Reetz abstention, followed immediately by a citation *Reetz* v. *Bozanich, supra*—the court below did mention the relationship between the parties, namely, the e's highest court and members of the Bar, "is an exely delicate one." But the delicacy of the relationship ween the parties is in itself no ground for any sort of ention, let alone the *Burford* sort. There was at least nuch delicacy involved, for example, in *Law Students earch Council* v. *Wadmond,* 401 U.S. 154 (1971).

is subject to serious question whether *Burford* v. *Sun Co., supra; Alabama Public Service Commission* v. *hern Railway Co., supra,* and the very few decisions them retain any vitality beyond their own immediate ıal contexts. Cf. *County of Allegheny* v. *Frank huda Co.,* 360 U.S. 185 (1959); and see 1A Moore's ERAL PRACTICE, 2101-2114 (1965). They can in any event none in the context of the instant case. In *Burford,* application of a complex state program of intricate lation of the oil industry was attacked. This Court ed the confusion, delay and misunderstanding that ıt follow upon multiple review by many courts, state federal, of the same sort of general issues in numersuits attacking particular orders made under the state ram. The Court, therefore, wished to centralize adcation in the highest state court and in itself. The *ama Public Service Commission* case also involved an mpt at episodic intervention in a continuous course of e administration. Again, *Koehler* v. *Ogilvie, supra,* an attack on "the manner in which the judges of the uit Courts of the State of Illinois administer the die laws." 53 F.R.D. at 101-102.

the instant case, the court below was confronted with ttack on the administration of Rule 1:21-7. It was not d to pass on one of many and varied applications of

the Rule, or on the manner in which, in the aggregate, the Rule has been or might be administered. The court was asked to pass rather on the federal constitutional claim that the entire Rule is unconstitutional. No episodic involvement by the court in the minutiae of the daily administration of an otherwise concededly constitutional scheme of state regulation was here called for. This case could not be more distant from *Burford* and like decisions. If this case is *Burford*, then so are all state cases in federal courts.*

Given its reliance on *Reetz* v. *Bozanich, supra,* which constitutes the only possible ground for its decision, the court below may have intended the judgment of dismissal to be understood as being without prejudice. Yet the court denied a motion to amend the judgment so as to make such an understanding explicit, as is the practice in other courts which sometimes use a dismissal rather than a stay in this sort of abstention case. A dismissal without more is, of course, generally understood to be a dismissal with prejudice. The position in which the court below has left appellants is in any event one that disables them from making a rational choice to ensure preservation of their federal rights. Appellants submit that to have placed them in this position was an abuse of discretion on the part of the court below.

If appellants act on the assumption that the dismissal was intended to be without prejudice to the resumption of the litigation in the district court following decision of issues of state law in the state courts, then they will pro-

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* It hardly requires statement that *Younger* v. *Harris,* 401 U. S. 37 (1971), and the cases decided with it have no bearing on the instant case, and that neither does 28 U.S.C. § 2283, see *Roudebush* v. *Hartke,* 405 U. S. 15, 20-23 (1972).

ceed in the manner indicated in *England* v. *Louisiana Board of Medical Examiners, supra,* seek adjudication only of issues of state law in the state courts, thus foreclosing the possibility of review in this Court, and ultimately return to the district court, if necessary. This is the course appellants have followed. Should they later discover that their assumption was wrong, that the dismissal was intended to be with prejudice, and that the district court will not hear them again, they will have lost any possibility of being heard in any federal forum, including this Court on review. To assume, on the other hand, that the dismissal was with prejudice is gratuitously to acquiesce in the abandonment rather than postponement of federal jurisdiction at the trial level, and in deprivation of the right to elect adjudication of federal claims in a federal district court. For on this assumption, in order to preserve at least the possibility of review in this Court, appellants would have to seek adjudication of their federal claim in the New Jersey courts; and such adjudication would be *res judicata.*

The abstention doctrine notoriously leads to complexities. It exacts a price. But as applied by the court below, it amounts to a snare, for the wary as much as the unwary. The creation of such a snare cannot be what is intended by abstention. It cannot be regarded as an acceptable price for the benefits derived from the abstention doctrine. And it cannot be within the discretion of a district court.

The Three-Judge Court Issue and the Simultaneous Appeal to the Court of Appeals

Appellants took the position in the court below that 28 U.S.C. § 2281 is "an enactment technical in the strict sense

of the term and to be applied as such." *Phillips* v. *United States,* 312 U.S. 246, 251 (1941). So applied, appellants contended, the statute calls for convening a three-judge court only when a state's legislative policy, as declared either by its legislature or by an administrative body, is put in question. A rule of court, therefore, such as Rule 1:21-7 in this case, is not within the coverage of 28 U.S.C. § 2281. That is evident on the face of the statute, and since the "statute is to be strictly construed," *Board of Regents of the University of Texas System* v. *New Left Education Project,* 404 U.S. 541, 545 (1972), it should be an end of the matter.

The only judicial opinion that appellants have been able to find which concludes that 28 U.S.C. § 2281 may in any circumstances be applicable to a rule of court or any other judicial order is the two-paragraph opinion in *Razos* v. *Drusina,* 440 F. 2d 795 (5th Cir. (1971)* *Razos* concerned a challenge to Texas Rules of Civil Procedure 749 and 750, promulgated by the Texas Supreme Court pursuant to Acts 1939, 46th Leg., Ch. 25, § 1, p. 201, Art. 1731a, *Vernon's Ann. Civ. Stat.* This statute specifically confers on the Supreme Court rule-making power in civil judicial proceedings, including power to override prior procedural statutes, but provides that rules

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* Cf. *Sufflizg* v. *Bondurant,* 339 F. Supp. 257 (D. N. M. 1972) (residency rule of Board of Bar Examiners appointed by Supreme Court of New Mexico held constitutional by three-judge court; no discussion of three-judge court issue); *Potts* v. *Honorable Justices of the Supreme Court of Hawaii,* 332 F. Supp. 1392 (D. Hawaii 1971) (statutory residency requirement for bar admission and implementing rule of Supreme Court of Hawaii declared unconstitutional; three-judge court justified because injunctive relief sought "against a state statute and an order made by an administrative board or commission acting under a state statute," 332 F. Supp. at 1392).

are to become effective only if not disapproved by the legislature, where they must lie on the table for at least sixty days. The court emphasized this aspect of the rule-making authority in Texas. It is thus arguable, appellants contended, that the Texas system was viewed as combining the judicial and the legislative functions, and as at least constructively constituting the Texas Rules of Civil Procedure an act of the Texas legislature. But the situation in the instant case is altogether different. The New Jersey Supreme Court's Rule 1:21-7 is in no sense, however attenuated, an enactment of the New Jersey legislature. It was promulgated pursuant to no enabling act whatever, and neither by lying on the table nor in any other way did it remotely receive the approval, however tacit, of the New Jersey legislature. The holding in *Razos* v. *Drusina, supra,* appellants contended, is therefore not applicable on the facts of the instant case.

Since there was thus no challenge in this case to a statute within the meaning of 28 U.S.C. § 2281, nor any challenge to the validity of any provision of the New Jersey Constitution, but only a challenge to the lawfulness of authority purportedly exercised under it, compare *Phillips* v. *United States, supra,* with *American Federation of Labor* v. *Watson,* 327 U.S. 582 (1946), appellants contended that the instant case was not properly one for a three-judge court.

"To guard against a frustration of review by this Court's refusal to accept jurisdiction," *Stainback* v. *Mo Hock Ke Lok Po, supra,* 336 U.S. at 370, appellants have, as previously noted, filed a notice of appeal to the Court of Appeals for the Third Circuit, and docketed their appeal there. They have also moved before Chief Judge Seitz for an order staying all proceedings in that appeal pending this Court's disposition of the instant appeal. Should this

Court find that it does indeed lack jurisdiction of this appeal because the case should not have been heard by a three-judge court, appellants respectfully submit that, in the circumstances, all considerations of justice to the parties and of the economy of judicial effort counsel disposition of this case on the model of *Turner* v. *City of Memphis*, 369 U.S. 350, 353-354 (1962), and *Stainback* v. *Mo Hock Ke Lok Po, supra*, 336 U.S. at 380-81.

In light of the perfected appeal to the Court of Appeals for the Third Circuit, it is as appropriate here as it was in *Turner* v. *City of Memphis, supra*, 369 U.S. at 353-354, that this Court treat "appellant's jurisdictional statement as a petition for writ of certiorari prior to judgment in the Court of Appeals," under 28 U.S.C. §§ 1254(1), 2101(e). Guidance from this Court is essential if the abstention doctrine is not to operate, as it has in this case, as a trap for litigants from which there is no possible escape short of involuntary abandonment of the right of access to a federal district court. That guidance can best be provided in this case, should the Court conclude that it has no appellate jurisdiction, by treating this jurisdictional statement as a petition for certiorari before judgment in the Court of Appeals, and thus preventing a further drain on the resources and energies of both the litigants and the federal judiciary.

CONCLUSION

For the reasons assigned, appellants respectfully submit that the question presented herein is substantial and merits adjudication by this Court.

Respectfully submitted,

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[APPENDICIES FOLLOW]

APPENDIX A

Opinion of United States District Court

(Filed—June 20, 1972.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION No. 64-72

CIVIL ACTION No. 142-72

AMERICAN TRIAL LAWYERS ASSOCIATION, NEW JERSEY BRANCH and TRIAL LAWYERS OF MIDDLESEX COUNTY

v.

NEW JERSEY SUPREME COURT

PHILIP G. AUERBACH, BERNARD F. CONWAY, and TRIAL ATTORNEYS OF NEW JERSEY, a corporation of the State of New Jersey

v.

THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE NEW JERSEY SUPREME COURT

Before: SEITZ, *Chief Judge*, (Circuit Judge), BARLOW and LACEY, *District Judges*.

Appendix A

PER CURIAM.

This matter comes before us on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss. The complaints challenge Rule 1:21-7(c), promulgated by the New Jersey Supreme Court effective January 31, 1972. In essence the rule establishes a schedule of maximum contingent fee percentages applicable to tort litigation conducted by New Jersey attorneys, whether in the state or federal courts. With few exceptions the fee percentages are restricted to the following limits:

(1) 50% on the first $1000 recovered;

(2) 40% on the next $2000 recovered;

(3) 33⅓% on the next $47,000 recovered;

(4) 20% on the next $50,000 recovered;

(5) 10% on any amount recovered over $100,000.

Plaintiffs include several state trial attorneys appearing individually and three professional associations representing various groups of such attorneys. Both the individual plaintiffs and the members represented by the plaintiff associations devote substantial time to tort litigation governed by the challenged rule. The theme common to plaintiffs' complaints is that Rule 1:21-7(c) violates the Federal Constitution, in its enactment as well as application. Plaintiffs seek an adjudication of the rule's unconstitutionality and an order permanently enjoining the rule's operation or enforcement.

Essentially the case poses a dispute between a state's to practice law in the state. The relationship between the highest court and those persons authorized by that court

parties thus is an extremely delicate one. Under such circumstances federal courts generally have considered it appropriate, before attempting any direct federal intervention at the outset, first to permit the state courts to process the dispute. Cf. Reetz v. Bozanich, 397 U. S. 82, 85-87 (1970). As was true in *Reetz* the initial issue is whether the state constitution authorized the enactment challenged. Presented with such a situation the Court in *Reetz* concluded that:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. . . . That is especially desirable where the questions of state law are enmeshed with federal questions. . . . Here, the state law problems are delicate ones, the resolution of which [are] not without substantial difficulty—certainly for a federal court. . . . In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily."

Id. at 85, quoting City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U. S. 639, 640-41 (1959).

Plaintiffs' primary contention concerns the authority, under Article VI, §2, para. 3 of the New Jersey Constitution, for the state supreme court to promulgate Rule 1:21-7(c). And, in concluding that abstention is the proper course here we realize that plaintiffs must therefore re-

sort to the state court to argue their position. Plaintiffs do not suggest that procedures for raising such a challenge in the state courts are unavailable. Cf. Gair v. Peck, 6 N. Y. 2d 97, 188 N. Y. S. 2d 491 (1959). Rather, they emphasize that by leaving them to the state courts they ultimately must have their cause decided by the same body which took the action they attack. Admittedly, this is so. Nevertheless, we cannot conclude that the state courts will listen with deaf ears to plaintiffs' challenge simply because plaintiffs attack the rulemaking authority of the state supreme court. Cf. Gair v. Peck, supra.

We also acknowledge that a potentially prejudicial delay affecting plaintiffs inheres in our decision to abstain. Such potential by itself, however, cannot justify a decision on the merits when abstention otherwise is appropriate. Cf. Reetz v. Bozanich, supra at 87. In addition, we feel confident that any prejudice possible is significantly minimized by subsection (f) of the challenged rule permitting an individual attorney substantially affected by the immediate continued implementation of Rule 1:21-7(c) to recover fees in excess of those authorized by the announced schedule when the circumstances of his particular case justify additional compensation.

Defendants' motion to dismiss the complant is granted. Our decision as to this motion renders plaintiffs' motions moot.

ORDERED this day of June 1972, that defendants' motion to dismiss the complaint is granted.

COLLINS J. SEITZ

GEORGE H. BARLOW

FREDERICK B. LACEY

APPENDIX B

Rule 1:21-7 of the Supreme Court of New Jersey

1:21-7. Contingent Fees

(a) As used in this rule the term "contingent fee arrangement" means an agreement for legal services of an attorney or attorneys, including any associated or forwarding counsel, under which compensation, contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement, is to be in an amount which either is fixed or is to be determined under a formula.

(b) An attorney shall not enter into a contingent fee arrangement without first having advised the client of the right and afforded the client an opportunity to retain him under an arrangement whereby he would be compensated on the basis of the reasonable value of his services.

(c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

(1) 50% on the first $1000 recovered;

(2) 40% on the next $2000 recovered;

(3) 33⅓% on the next $47,000 recovered;

(4) 20% on the next $50,000 recovered;

(5) 10% on any amount recovered over $100,000; and

(6) where the amount recovered is for the benefit of an infant or incompetent and the matter is settled with-

out trial the foregoing limits shall apply, except that the fee on any amount recovered up to $50,000 shall not exceed 25%.

(d) The permissible fee provided for in paragraph (c) shall be computed on the net sum recovered after deducting disbursements in connection with the institution and prosecution of the claim, whether advanced by the attorney or by the client, including investigation expenses, expenses for expert or other testimony or evidence, the cost of briefs and transcripts on appeal, and any interest included in a judgment pursuant to R. 4:42-11(b); but no deduction need be made for liens, assignments or claims in favor of hospitals or for medical care and treatment by doctors and nurses, or similar items. The permissible fee shall include legal services rendered on any appeal or review proceeding or on any retrial, but this shall not be deemed to require an attorney to take an appeal.

(e) Paragraph (c) of this rule is intended to fix maximum fees and does not preclude an attorney from entering into a contingent fee arrangement providing for, or from charging or collecting a contingent fee below such limits.

(f) If at the conclusion of a matter an attorney considers the fee permitted by paragraph (c) to be inadequate, an application on written notice to the client may be made to the Assignment Judge for the hearing and determination of a reasonable fee in light of all the circumstances. A copy of any such application and of all papers filed in support of or in opposition thereto, together with a copy of the court order fixing the fee shall be filed with the Administrative Office of the courts. This rule shall not preclude the exercise of a client's existing right to a court review of the reasonableness of an attorney's fee.

Appendix B

g) Where the amount of the contingent fee is limited the provisions of paragraph (c) of this rule, the con-ent fee arrangement shall be in writing, signed both he attorney and the client, and a signed duplicate shall given to the client. Upon conclusion of the matter re-ing in a recovery, the attorney shall prepare and fur- the client with a signed closing statement. Such con-ent fee arrangement and closing statement, if any, l be in the form prescribed by the Administrative Di-or of the Courts. To provide information for study poses as to the subject of contingent fees and the op-ion of this rule, copies of all such contingent fees ar-gements entered into between the effective date of this (January 31, 1972) and January 31, 1973, shall, with-0 days of their execution and delivery, be filed with the inistrative Office of the Courts, and copies of any clos- statements on matters covered by such filed contin-t fee arrangements shall likewise be filed, within 10 s of their execution and delivery, with the Administra- Office of the Courts. All such filed contingent fee ar-gements and closing statements and all applications accompanying papers filed pursuant to paragraph (f) his rule shall be confidential and access to or use there-hall be only as authorized by the Supreme Court.

e effective January 31, 1972.

APPENDIX C

Clerk's Docket Entry of Order of September 6, 1972 Denying Plaintiff's Motion to Alter or Amend Judgment

CLERK'S OFFICE
UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW JERSEY
TRENTON

CIVIL ACTION No. 64-72, 142-72

AMERICAN TRIAL LAWYERS ASSOCIATION, *et al,*

vs.

NEW JERSEY SUPREME COURT

PHILIP G. AUERBACH, *et al.*

vs.

THE CHIEF JUSTICES AND THE ASSOCIATE JUSTICES OF THE N. J. SUPREME COURT

There was entered on the docket on 9-6-72 an order (judgment) denying plaintiff's motion to alter or amend the judgment filed 9-5-72. (Seitz, Barlow & Lacey).

ANGELO W. LOCASCIO,
Clerk

APPENDIX D

Notice of Appeal to the United States Supreme Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(Civil Action No. 64-72)

AMERICAN TRIAL LAWYERS ASSOCIATION,
NEW JERSEY BRANCH, *et al*,

Plaintiffs,

vs.

NEW JERSEY SUPREME COURT,

Defendant.

(Civil Action No. 142-72)

PHILIP G. AUERBACH, *et al*,

Plaintiffs,

vs.

THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE NEW JERSEY SUPREME COURT,

Defendant.

NOTICE is hereby given that each of the plaintiffs in the above consolidated cases, individually and as class representatives, hereby appeal to the Supreme Court of the United States from the Judgment dismissing the said ac-

tions, made by a Three Judge Court, comprised of Chief Judge Seitz of the United States Court of Appeals for the Third Circuit, and District Judges Barlow and Lacey, entered June 21, 1972, and the final order of the same Court denying the plaintiffs' motion to amend the said Judgment, entered September 6, 1972.

This Appeal is taken pursuant to 28 U.S.C. Sec. 1253.

SCHNITZER AND SCHNITZER, ESQS.
Attorneys for the Plaintiffs in
Civil Action No. 64-72
By MORRIS M. SCHNITZER,
A Partner

Dated: October 2, 1972.

WILLIAM O. BARNES, JR., ESQ.
Attorneys for the plaintiffs in
Civil Action No. 142-72.

Of Counsel:

ALEXANDER M. BICKEL, ESQ.

CERTIFICATION OF SERVICE

I, MORRIS M. SCHNITZER, one of the attorneys for the plaintiffs-appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on October 2, 1972, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon the defendant-respondent, by mailing a copy, in a

duly addressed envelope, postage prepaid, to the attorney of record of the defendant-respondent, namely, Stephen Skillman, Assistant Attorney General of New Jersey, State House Annex, Trenton, New Jersey, 08625.

MORRIS M. SCHNITZER
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